Nos. 90-1419, 90-1769

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,
Respondents.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.

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Amtrak is a congressionally created and federally subsidized corporation with the statutory mission of providing "cost-efficient . . . intercity railroad passenger service" (45

U.S.C. § 501(a)).[1] The line of track at issue in this case is essential to the operation of the *Montrealer*, a route Congress considered so important that it specifically appropriated funds for rehabilitation of that line. *See* Amtrak Br. 9.[2] The line needed rehabilitation because, as an arbitration panel found, respondent had breached its agreement to maintain the line (*see* Amtrak Br. 8 n.9), allowing it to deteriorate to a point where it could not be used for passenger service. The issue in this case is whether Amtrak could use its power under Section 402(d) to condemn the line and subsequently place it in the hands of an owner who would provide "a guaranteed 20 years of proper maintenance on the rail line, and a commitment allowing Amtrak trains to operate on the rail line at a reasonable, predetermined compensation level." Pet. App. 42a.

Section 402(d) of the Act authorizes Amtrak to seek the conveyance of "property (including interests in property) . . . required for intercity rail passenger service." The ICC gave the phrase "property . . . required for" a natural meaning: a line of track is "property", and it is "required" if Amtrak intends to provide service over it. The Second Circuit (interpreting the same phrase in a parallel section

[1] Amtrak is, as respondent and the *amici* railroads repeatedly remind the Court, a private corporation. But it was created pursuant to the RPSA, 45 U.S.C. § 541, and its mission is defined by that statute. 45 U.S.C. § 501a. Six of its nine directors are appointed by the President, two are appointed by the Secretary of Transportation (as Amtrak's preferred stockholder), and the ninth is the president of Amtrak, selected by the Board. *See* 45 U.S.C. § 543. Amtrak receives federal operating subsidies and capital grants, and it is instructed to "[e]xercise [its] best business judgment in taking actions to minimize [such] subsidies . . . ." 45 U.S.C. § 501a(1). *See generally National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe R. Co.*, 470 U.S. 451, 454 (1985).

[2] Respondent concedes that Amtrak needed the "'use [of the B&M segment] in a condition permitting resumption of Montrealer service.'" Res. Br. 16, *quoting* Pet. App. 18a.

of the Act) and Congress (reacting to this case) both agreed with the ICC.

Respondent and the *amici* railroads argue for an unnatural and unworkable alternative reading: when Amtrak seeks the conveyance of a line of track, they say, the ICC must first determine whether Amtrak really "requires" the fee interest or could make do with something less. This reading of Section 402(d) would not give Amtrak an "election of remedies" (Pet. App. 39a), including the swift and sure remedy of condemnation, but instead would give it the right to a preliminary proceeding in which the ICC would attempt to determine the minimum interest that would meet Amtrak's needs. But this reading, which is contrary to an ICC interpretation that is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), is unsupported by anything in the text, structure, purpose or legislative history of the statute before the 1990 Amendment and was flatly rejected by Congress in 1990.

I. THE COMMISSION'S INTERPRETATION OF THE PHRASE "REQUIRED FOR INTERCITY RAIL PASSENGER SERVICE" WAS CORRECT AND IS IN ANY EVENT ENTITLED TO DEFERENCE

All parties agree that the B&M segment, in a substantially upgraded condition, was essential to the provision of Amtrak's *Montrealer* service. The ICC ruled that, in order to obtain a property thus required for its intercity rail passenger service, Amtrak "is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads." Pet. App. 39a. The ICC recognized that because of B&M's past practices Amtrak would be required to spend on rehabilitation more than "$3 million in funds which have been appropriated specifically for its benefit" (Pet. App. 42a); the ICC noted that the proposed transaction would give Amtrak a 20-year guarantee of proper maintenance and a 20-year com-

mitment to a reasonable, predetermined compensation level for Amtrak operations (*id.*); the ICC held that Amtrak has an "election of remedies," Pet. App. 39a, and specifically "conclude[d] that Amtrak has demonstrated that it has not abused the process available under § 402(d)" (Pet. App. 42a).[3] It therefore expressly rejected respondent's contention that Amtrak should receive mere trackage rights from B&M under Section 402(a).[4]

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[3] There is no basis for respondent's occasional implication that Amtrak might, in some other case, make inappropriate use of its statutory powers. In addition to the Commission's general power under Section 402(d), Amtrak is subject to broad general oversight by the Executive Branch and Congress, particularly as to actions that may affect its continuing needs for substantial federal subsidies. And if, as here, Amtrak plans to convey part or all of the property to a third party, that reconveyance must, under the 1990 Amendment, be "found by the Commission to further the purposes of the Act." See Section 402(d)(1), as amended, Amtrak Br. 12a.

[4] Respondent repeatedly states that the ICC acted without any "evidentiary proceeding." *See, e.g.*, Res. Br. 2 n.1, 8, 9, 15 and 42. In fact, because of the rapid deterioration of the line and the statutory command to issue a final decision within 120 days, the ICC followed the "modified procedures" provided for by its Rules of Practice, 49 C.F.R. Part 1112. Pet. App. 124a, 133a. These procedures provide for discovery and submission of sworn written direct, reply, and rebuttal testimony. Parties may move to strike inadmissible evidence and may request cross-examination under special circumstances. Such a proceeding is certainly an "evidentiary" proceeding and has been held to constitute a full and fair hearing under the Administrative Procedure Act, 5 U.S.C. § 556(d). *Subler Transfer, Inc. v. United States*, 396 F. Supp. 762, 765-66 (S.D. Ohio 1975). *See also Laird v. Interstate Commerce Commission*, 691 F.2d 147, 154-55 (3d Cir. 1982), *cert. denied*, 461 U.S. 927 (1983).

In this case, with its application on April 4, 1988, Amtrak submitted sworn written testimony, which was subject to rebuttal by B&M. B&M filed a request that the Commission reject the application and had the opportunity to submit evidence in support of that request. In its first order, served on April 29, 1988, the Commission denied B&M's request on the basis of the submissions that had been made. Later decisions and findings of the Commission were based on these submissions and

Respondent rejects the ICC's interpretation and contends that "Amtrak has no power to take a property *interest* greater than that 'required' " (Res. Br. 15 (emphasis added)), so that if Amtrak seeks to condemn a line of track over which it intends to run trains, the ICC must conduct a proceeding in which it pares the fee interest down to whatever lesser interests it determines would suffice. To avoid the deference to the Commission required by the *Chevron* case, respondent and the *amici* railroads assert that the statute is "unambiguous" (Res. Br. 17-23; Amici Br. 4-5) on that point and make additional arguments based on supposed statutory structure, legislative history, other alleged statutory policies the Commission somehow missed, and purported constitutional problems. None of these contentions has merit.

A. *Language.* The words of Section 402(d)(1), read perfectly naturally, are entirely consistent with the ICC's interpretation. A line of track is "property"; a line of track on which Amtrak intends to run trains is "property . . . required for intercity rail passenger service," just as an office building might be found to be "required" for governmental offices, and therefore condemned in fee, even though other arrangements affording the government the use of the building might also suffice.

The parenthetical references to "interests" in property plainly *permit* Amtrak to seek less than the fee, but they do not (and certainly do not unambiguously) *require* Amtrak to seek only the minimum interest that might suffice to meet its needs. And the threshold proceeding envisioned by respondent, in which the ICC hears both sides and pares down Amtrak's request to the minimum interests in property the Commission thinks sufficient, is not even hinted at in the statute.[5]

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submissions filed by Amtrak and other parties at later stages of the proceeding.

[5] The proceeding respondent envisions would often be complex and

Nothing in the words of Section 402(d) before 1990 suggested that Amtrak could not condemn any interest in property that it did not intend to keep, and the 1990 Amendment now makes it perfectly clear that, to the contrary, Amtrak may intend a further conveyance as long as that transaction "is found by the Commission to further the purposes of the Act." There simply is nothing in the text of Section 402(d)(1) that precludes reading it to mean that Amtrak may condemn property it "requires" for use, not in order to keep the property but in order to make satisfactory arrangements for its future availability.[6]

Finally, our contention that the words of Section 402(d)(1) at the very least *permit* the interpretation adopted by the ICC is reinforced by the decision of the Second Circuit in *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484

protracted. For example, respondent suggests that the intentions of the pertinent parties would be relevant to Amtrak's needs, because Amtrak clearly should not be left "with nothing but a breach-of-contract action." Res. Br. 22 n. 10. Amtrak of course had just such a fear in this case, where as noted above respondent was in material breach of its maintenance contract.

[6] Respondent cites *United States v. Carmack*, 329 U.S. 230 (1946), and subsequent lower court cases for the proposition that a condemnation power granted to private parties must be narrowly construed. But the entity that orders the conveyance under Section 402(d) is the ICC, not Amtrak. Moreover, general canons of statutory construction must obviously yield to the responsible agency's interpretation of a specific statute. Finally, nothing in *Carmack* conflicts with the ICC's reading of Section 402(d) to grant Amtrak the power it exercised here. *Carmack* involved a taking by federal officers, which was sustained against the objection that the statutes did not authorize federal takings of property already being used for public purposes by a municipality. The Court distinguished grants of condemnation power to federal officers from grants to public utilities, saying that the latter "do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater powers." 329 U.S. at 243 n.13. This dictum was centrally addressed to the need for a clear expression before a private party will be permitted to prime other *governmental* uses; there is no such issue in this case.

U.S. 954 (1987). The court there construed the words "property . . . required for intercity passenger service," as they appear in a parallel provision of the RSPA (Section 305(d)(1)(B), governing condemnation of nonrail property) to allow Amtrak to condemn a fee interest which was then reconveyed, without inquiry into whether condemnation of an easement (the property interest Amtrak ultimately retained) would have sufficed. The court said that Amtrak need show only a "significant relationship" between the condemnation and the provision of passenger service. 822 F.2d at 1265. That decision, and Judge Ginsburg's concurrence below, surely demonstrate at least that the text is not dispositive in respondent's favor.

B. *Statutory Structure.* Respondent contends (Res. Br. 19) that the statute has a "simple, logical, and clear" overall structure under which Amtrak must use Section 402(a) if it requires only the "use" of tracks or other facilities and may use Section 402(d) only if it needs to make an "*acquisition* of property" (*id.* (emphasis in original)).[7] The Commission ruled, to the contrary, that the statute gives Amtrak an "election of remedies." Pet. App. 39a. We submit that the structure in fact favors the Commission's reading and that the Commission's reading is at the very least a "permissible" one. *Chevron*, 467 U.S. at 843 & n.11.

First, nothing in Section 402(a) or Section 402(d) suggests that either section is an exclusive remedy in any given situation, or that Section 402(d) is a remedy of last

[7] Amtrak would contend, of course, that it did "require" the "acquisition" of the property. Its whole experience over a period of years demonstrated that the line of track would not be adequately available for its use as long as it was still owned by B&M. But Amtrak was not obliged to demonstrate to the Commission that trackage rights would not suffice. Under the Commission's correct interpretation, since Amtrak plainly required the segment, it had an election of remedies, to be made in accordance with its judgment "depending on the type of service problems it encounters." Pet. App. 39a.

resort. Neither section makes any reference to the other, express or implicit, or posits in any way that the other must be unavailable before it can apply. Second, contrary to respondent's submission (Res. Br. 24-25), it is their reading, not the Commission's, that would make part of the statute superfluous. On the Commission's reading, usage rights under Section 402(a) will remain an important (indeed, almost always preferred) alternative to condemning property and paying just compensation under Section 402(d). On respondent's reading, it would be difficult (as demonstrated by respondent's struggle, Res. Br. 22) to find any meaningful application for Section 402(d), since that section would not be available unless Amtrak needs more than the use of property.

Respondent's arguments about "structure" also ignore the most important structural element. The condemnation power provided in Section 402(d) was obviously intended, as it usually is, to enable the condemnor (here, Amtrak) to move swiftly in situations, like the present, where service is suspended, property is deteriorating, and money is available. That is why Section 402(d)(2) says that the Commission shall expedite proceedings and in any event issue its order within 120 days after Amtrak's first filing; it is also why the section goes on to provide for conveyance prior to the determination of just compensation. Respondent's reading of the statute, under which the Commission would respond to Amtrak's application for the conveyance of a needed line of track by holding some sort of hearing on whether a lesser interest would suffice, is wholly inconsistent with this command for expedition.

C. *Legislative History*. Respondent argues that the "Commission's Construction Flies in the Face of the Legislative History." Res. Br. 28. But even if legislative history could make up for the failure of the statutory text to speak "directly . . . to the precise question at issue," *Chevron*, 467 U.S. at 842, it does not do so here. First, the premise of respondent's argument is that the examples

given in testimony and the Senate Report should limit the application of a statute whose language is broad. The Court has repeatedly rejected that use of legislative history, most recently in *Union Bank v. Wolas*, ___ U.S. ___, 60 U.S.L.W. 4043, 4045 (December 11, 1991): "The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." (Citation omitted.)[8]

Second, respondent misses the significance of the lengthy excerpt it quotes (Res. Br. 29) from the Senate Report. The key statement is that condemnation power is needed because usage rights are not always "the most economical means by which Amtrak could fulfill its requirements . . . ." The objective reflected throughout the excerpt is to offset the weakness of Amtrak's bargaining position when (as here) its operating needs are site-specific. When Amtrak sought to obtain the use of a rehabilitated and maintained B&M segment at the lowest net cost to itself, it was doing exactly what Congress (as reflected in this excerpt and in the statutory sections discussed below at 10) wanted it to do.

Finally, the legislative history of Section 402(d) offers no support for the proposition that the phrase "property . . . required for intercity rail passenger service" is intended to state a substantial threshold requirement, forcing the ICC to determine in each case whether less than the fee interest would suffice. Indeed, the conference re-

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[8] Respondent implies (Res. Br. 28-30), without quite saying, that Section 402(d) was intended only to allow acquisition of terminals and other similar facilities and that (despite the breadth of the statutory word "property") the section does not apply to lines of track at all. If that is respondent's contention, then it is attributing to the statute an "unambiguous" meaning that is quite different from the unambiguous meaning found by the court of appeals. Moreover, the Commission flatly rejected this argument by B&M at the outset of this proceeding. Pet. App. 132a-133a.

port on the Amtrak Improvement Act, which first added Section 402(d), never mentions the phrase "required for intercity passenger service." It speaks only about property which Amtrak "needs", and says that "Amtrak's need" "would be deemed to be established" unless the subsection (A) and (B) findings were both made. Conf. Rep. No. 587, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2331 at 2338.

D. *Respondent's Policy Arguments.* Respondent (Res. Br. 26 *et seq.*), and its *amici* (Amici Br. 17-22), argue that the Commission's interpretation conflicts with ICC and congressional policies. Even if these arguments were a good deal stronger than they are, they would not substitute for statutory language speaking directly to the "precise question at issue": *Chevron*'s requirement of deference to the interpretation made by the responsible agency is at its strongest where questions of regulatory policy are presented. *See* 467 U.S. at 864-66. But, in fact, the policy arguments are without merit.

To begin with, respondent and its *amici* simply ignore the policies explicitly set forth in the statute directly involved in this case, the RPSA. That statute makes it clear that Congress expected Amtrak to arrange its affairs so as to provide service at the least cost to the United States and that Congress hoped Amtrak would receive private sector support, including "subsidies", in doing so. In Section 102 of RPSA (Amtrak Br. 1a-2a), Congress set the goals for Amtrak including "(1) Exercise of [Amtrak's] best business judgment . . . to minimize Federal subsidies. . . ."; "(2) Encouragement of State, regional, and local governments *and the private sector* to share the costs of operating rail passenger service . . . in order to minimize Federal subsidies. . . ."; "(7) Development of service on rail corridors, *subsidized by States or private parties, or both* . . . ."; and "(10) Encouragement of rail carriers to assist in improving intercity rail passenger service." (Emphasis added.) The partnership here among Amtrak, Central Vermont and the State of Vermont would appear to be precisely the kind of cooperation that Congress envisioned.

Respondent nevertheless argues that the present transaction violates a supposed policy against "cross-subsidization". In fact, there is neither any such policy applicable to this case nor any cross-subsidization here. To begin with, neither Section 402(d) nor Section 402(a)(1), the section providing for Amtrak to obtain trackage rights from freight railroads, mentions cross-subsidization.[9] Section 402(a)(1) provides that, where the Commission is required to fix compensation for trackage rights, the freight railroad shall be awarded "just and reasonable" compensation, and Section 402(d) provides that the condemnee railroad shall receive "just compensation", which B&M received here. Neither section says anything about the terms on which another railroad, like Central Vermont, may voluntarily deal with Amtrak.

In any event, there is no "cross-subsidization" here. B&M has received "just compensation", and Central Vermont voluntarily entered into arrangements economically satisfactory to it, which included Amtrak's contribution of $3.1 million towards the upgrading of a line over which Central Vermont had for decades operated its freight service. It may well be (as respondent suggests, Res. Br. 27) that Central Vermont was in a position to offer Amtrak

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[9] By instructive contrast, Subsection (2) of Section 402(a), which governs freight carriers' use of properties owned by Amtrak, *does* state that the Commission, in fixing compensation to be paid *to Amtrak*, "shall not permit cross subsidization . . . ." Amtrak Br. 6a-7a. It goes on to say that the freight railroad shall bear not only all of "the costs incurred by [Amtrak] solely for the benefit of that railroad" but also "a proportionate share [measured by relative use] of all other costs of providing services. . . ." *Id.* Subsection (1), governing compensation awarded to a freight railroad for Amtrak's use of its facilities, limits the circumstances under which Amtrak may be required to pay more than "incremental costs"; if Amtrak's failure to pay any share of fixed costs is a subsidy, it is one that Congress explicitly blessed.

better terms than B&M: Central Vermont wanted a well maintained Connecticut River Line for its own use, while B&M's parent appeared content to allow the Connecticut River Line to deteriorate. If so, the multi-party transaction here was fair to all concerned, made substantial economic sense, and (most importantly for present purposes) was thoroughly consistent with the letter and spirit of the statute.[10]

There is no warrant for respondent's speculation that in some future case Amtrak could, by threatening to use its Section 402(d) power, somehow bully a freight railroad to provide trackage rights on terms that are unfair to it or contrary to the statute. A freight railroad has not been treated unfairly or unlawfully if it is afforded the opportunity to obtain "just compensation" for its property. If another freight railroad, with its own incentives to maintain the property at a high level, is prepared to pay that amount and then to provide maintenance and usage rights on terms acceptable to Amtrak, a transaction transferring the property to that railroad promotes the goals of the RPSA. In any actual case, of course, the Commission (which expressly found that in this case Amtrak "has not abused the process available under § 402(d)" (Pet. App. 42a)) would have to find that the transfer to the other railroad in fact "further[s] the purposes of this Act." *See* Amtrak Br. 12a.[11]

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[10] Although the Interstate Commerce Act contains no explicit, general prohibition against cross-subsidies, respondent is correct that the Act has been construed by the Commission to preclude it from imposing an obligation on a carrier to cross-subsidize a shipper, another carrier or a transit authority, either through non-compensatory rates (49 U.S.C. § 10101a(10)), or through conditions to be imposed in merger proceedings. *See* Res. Br. 26-27. The voluntary arrangements among Amtrak, Central Vermont and the State of Vermont do not contravene any such policy.

[11] Here, Amtrak did not seek trackage rights from B&M at any price because its past experience raised doubts about B&M's willingness to honor its commitments, *see* Larson V.S., J. App. 33, and Amtrak did not want to be left with "nothing but a breach of contract action" (Res. Br. 22 n.10). In an attempt to suggest that the ICC believed B&M ownership would have been fully satisfactory, respondent and its *amici* repeatedly quote Judge Ginsburg's statement that ICC counsel "disavowed any doubt as to B&M's competence to maintain the track in question" (Pet. App. 27a). But Judge Ginsburg's comment omitted the fact, well known to respondent, that in the same colloquy ICC counsel expressed very considerable doubt about B&M's *willingness* to do so. *See Boston & Maine Corp., et al. v. Interstate Commerce Commission, et al.*, Nos. 88-1631, *et al.*, Transcript of Proceedings at 32-34 (D.C. Cir. January 18, 1990).

E. *The 1990 Amendment.* Respondent and the *amici* railroads have little to say about the 1990 Amendment, which would be dispositive of this case even if the court of appeals' initial decision had been correct. One express purpose of that amendment (obscured by respondent's startlingly truncated quotation of its sponsor, Senator Jeffords (*compare* Res. Br. 34 *with* Amtrak Br. 39)) was to reverse the initial result in this case. Its more general purpose (as is evident from its text and the existing statutory context to which it was added, as well as from its legislative history) was to make it clear that Amtrak may condemn property it intends to reconvey to a third party, as long as the ICC finds that the reconveyance "further[s] the purposes of the Act."[12] The amendment would have been wholly unnecessary if, as the court of appeals thought, it has no bearing on Amtrak's condemnation power and was intended only to confirm that Amtrak is free to transfer property that it changes its mind about after the condemnation.

One significance of the 1990 Amendment is that it is irreconcilable with the view that the existing words "prop-

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[12] The ICC, although it acted before the 1990 Amendment made this requirement explicit, did make a public interest finding here. It said: "Here, Amtrak has established that its interest in having the line conveyed [to itself and then to Central Vermont] is so that it may reinstitute its Montrealer passenger service—clearly a 'public purpose.'" Pet. App. 44a-45a.

erty. . . required for intercity rail passenger service" meant only those interests in property to which Amtrak needs to hold continuing title. At a minimum the amendment establishes that an intention to reconvey does not, as the court of appeals believed, demonstrate that Amtrak is seeking the conveyance of more than it "requires".

The *amici* railroads, in the one paragraph they devote to the amendment, concede that Congress was "apparently prompted by . . . concerns that the D.C. Circuit's first decision in this case absolutely foreclosed Amtrak from ever condemning an operating freight line in contemplation of reconveying that line to a third party." Amici Br. 16. They therefore abandon (*id.* 17) that portion of the lower court's decision on rehearing that stated the amendment "does not affect" its earlier construction of the "required for" language. Pet. App. 3a. The court of appeals and respondent should have done likewise.

F. *Constitutional Concerns.* Respondent and the *amici* railroads argue that the Commission's interpretation of Section 402(d) raises constitutional questions that could be avoided by substituting the court of appeals' interpretation for that of the Commission. But the supposed constitutional questions are without substance.

Both briefs argue that the Commission order permitting Amtrak's acquisition and reconveyance to Central Vermont of a fee interest in the B&M segment violated the "public use" requirement of the Fifth Amendment. *See* Res. Br. 36-40; Amici Br. 24-25, 28-30. But the relevant public purpose here was clearly stated by Congress: the provision of "modern, cost-efficient, and energy-efficient intercity railroad passenger service." *See* 45 U.S.C. § 501(a).[13] Amtrak's exercise of its Section 402(d) authority to acquire the B&M segment for purposes of reinstating *Montrealer* service manifestly served that public purpose, and the Commission so found. Pet. App. 44a-45a.[14]

[13] The public purpose of this transaction is evidenced by the fact that the three affected states—Vermont, Massachusetts and New Hampshire—all supported it, and substantial state and federal funds were appropriated in order to facilitate its consummation. *See generally* States' Br. 27 n.18.

Respondent argues that a taking of property from one private entity for reconveyance to another private entity without "changing the use to which the property is put" violates the Fifth Amendment. Res. Br. 37. But *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), forecloses the application of any such doctrine here. In that case, the housing authority condemned leased residential real estate, paid just compensation to the condemnee-lessors, and then sold the condemned real estate to the former lessees of the residences, without *any* change in the physical use of the property. *See id.* at 242-43. This Court unanimously upheld that action against a "public use" challenge.

This case involves much more substantial changes in use than *Midkiff*. Prior to the transaction, the condition of the B&M segment had deteriorated far below minimum suitability for high-speed passenger service. The transaction enabled Amtrak to render *Montrealer* service over track that had been rehabilitated to permit high speed passenger operations and would be well maintained for 20 years.

The *amici* railroads also argue that, under the Commission's interpretation, Section 402(d) is an unlawful delegation of federal regulatory authority to Amtrak. Amici

[14] Respondent's argument goes well beyond the view of the court of appeals, which plainly recognized that any use prescribed by Congress is a "public use". In its initial decision, the court said only that absent a "clearer statement" that Congress intended Amtrak to be able to reconvey condemned property, the Commission's interpretation gave rise to "at least colorable Fifth Amendment problems." Pet. App. 21a. On rehearing, after the 1990 Amendment supplied the "clearer statement," the panel majority did not suggest any continuing constitutional concern.

Br. at 23-24 & nn.19, 20.[15] But Amtrak's real area of discretion under the RPSA—to determine the routes over which it will provide its services—was not at issue below and is not before this Court. Amtrak's selection of a procedure to obtain the property needed to operate the routes is subject to the Commission's review of whether Amtrak has met the statutory requirements. *See* Pet. App. 40a ("Amtrak has met the statutory criteria for the institution of a proceeding under § 402(d) and, thus, is plainly entitled under the statute to a decision on the requested conveyance of the line."). And an Amtrak proposal to reconvey condemned property to a third party is subject to specific Commission review to determine whether it "further[s] the purposes of the Act."

II. THE ICC'S DECISION CONTAINS ALL OF THE FACTUAL DETERMINATIONS REQUIRED BY SECTION 402(d)

Respondent argues that the Commission did not adequately make three findings required by Section 402(d): (1) that the parties were "unable to agree" on the sale of the property; (2) that the property was "required for intercity rail passenger service;" and (3) that the condemnation would not significantly impair B&M's ability to carry out its obligations as a common carrier. In each case, respondent is actually just quarreling with the Commission's interpretation of the statute.

1. In its first ruling, the Commission briefly reviewed the parties' negotiations, noted that Amtrak had made a

[15] The *amici* cite *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) and *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935), as instances in which "[t]his Court has . . . invalidated federal legislation granting governmental authority to private parties." Amici Br. 23-24. But the power to order a conveyance is vested not in any private party but in the ICC, subject to statutory instructions. The Commission's interpretation of the statute to give Amtrak an election of remedies, rather than to make Section 402(d) a remedy of last resort, was hardly an abdication of its responsibilities.

"valid offer to purchase" (Pet. App. 130a) that B&M said it saw "no need to pursue" (Pet. App. 131a), and squarely rejected B&M's argument that Amtrak had failed to show that the parties had been "unable to agree." *See* Pet. App. 130a; Amtrak Br. 11. The Commission reiterated this conclusion in its final decision. *See* Pet. App. 40a.

Respondent argues (Res. Br. 42) that Amtrak's $1,000,000 offer and B&M's rejection were inadequate, even after the prior course of dealings between them, to show that they were "unable" to agree. But contrary to respondent's implication, the Commission was not required to conclude that no agreement could ever have been reached, or to delay proceedings until the parties agreed they were at an impasse, or to decide who was at fault for the failure to agree. It read "unable to agree" to apply to a situation where a valid offer is made and not accepted. On that reading, which is clearly a permissible reading of the phrase, it made the only finding the statute required.

2. Respondent also argues (Res. Br. 42) that the Commission did not adequately find that the property was required for intercity rail passenger service. This argument merely repeats the quarrel respondent and the panel majority have with the Commission's interpretation of the phrase. For the Commission, it was sufficient that Amtrak indisputably "required" the B&M segment for purposes of running its trains and had elected the Section 402(d) procedure to make that line of track available. Respondent's interpretation, under which "required" means that the Commission must carve out and deny any part of the fee interest that it finds Amtrak does not "require", is not a demonstrably better reading, let alone one that the Commission was compelled to adopt.

3. Respondent also renews the argument that the Commission should have found that B&M had proved that its service would be significantly impaired, within the meaning of Section 402(d)(1)(A). This argument, which appears to

be moot,[16] was answered in our opening brief. Amtrak Br. 46-47. Respondent now argues (1) that the Commission never considered the "ramifications" of requiring B&M to take trackage rights from "its principal rival"; and (2) that the Commission should have imposed the terms at the time it ordered condemnation, rather than waiting (as it did at B&M's request, *see* Pet. App. 92a), for the parties to negotiate and submit their areas of disagreement for resolution in a separate phase of the proceeding, as occurred here, *see National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interest In Connecticut River Line in Vermont and New Hampshire*, 7 I.C.C.2d 539 (1990). Res. Br. 44. But the design of trackage rights to protect the service capabilities and competitive position of a railroad is plainly a matter for Commission expertise. Even if this were a live issue, the Commission's square ruling that B&M's "ability to carry out its common carrier obligations over its entire system, and even to the shippers on the line conveyed, will not be impaired" (Pet. App. 46a) would be dispositive.

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[16] As previously noted, the statute directs the Commission to find that Amtrak's "need" has been established unless the Commission makes *both* the "impairment" finding under Section 402(d)(1)(A) *and* a finding under Section 402(d)(1)(B) that adequate alternative property is available to Amtrak. Respondent appears to concede, contrary to the view of the court below (see Pet. App. 19a-20a), that the Commission could not have found that there was adequate "alternative property" within the meaning of Section 402(d)(1)(B) to meet Amtrak's needs: under the statute, such property would have to be property "available for sale on reasonable terms," and no one has suggested that any alternative line of track was available for sale here. Accordingly, the "impairment" finding is not logically necessary in this case.

CONCLUSION

For the foregoing reasons and those contained in petitioners' opening brief, the decision of the court of appeals should be reversed and remanded with instructions to affirm the Commission's decision with regard to the conveyance issues.

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